

NO. COA14-789

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2015

ACC CONSTRUCTION, INC.,  
Plaintiff,

v.

Henderson County  
No. 13 CVS 1679

SUNTRUST MORTGAGE, INC., JACKIE  
MILLER, TRUSTEE of SUNTRUST  
MORTGAGE, INC., and SUBSTITUTE  
TRUSTEE SERVICES, INC., as TRUSTEE  
of SUNTRUST MORTGAGE, INC.,  
Defendants.

Appeal by Plaintiff from orders entered 3 March 2014 by Judge Marvin P. Pope, Jr., in Henderson County Superior Court. Heard in the Court of Appeals 20 November 2014.

*Karolyi-Reynolds, PLLC, by James O. Reynolds, for Plaintiff.*

*Parker Poe Adams & Bernstein LLP, by William L. Esser IV and Katie M. Iams, for Defendants.*

STEPHENS, Judge.

This appeal arises from a long-standing dispute between Plaintiff ACC Construction, Inc. ("ACC") and Defendant SunTrust Mortgage, Inc. ("SunTrust") over the respective priorities of ACC's mechanic's claim of lien and SunTrust's deed of trust against a property generally known as Lot 3 of Rebecca's Pond subdivision

in Henderson County ("the Property"). The procedural history stretches back over the course of multiple lawsuits to 2009. In the present case, ACC challenges the trial court's decision to grant SunTrust's Rule 12(b)(6) motion to dismiss ACC's claims for unjust enrichment and constructive trust based on *res judicata*, as well as the trial court's award of attorneys' fees to SunTrust as a sanction against ACC for bringing non-justiciable claims for an improper purpose. After careful consideration, we affirm the trial court's decision and grant SunTrust's motion for Rule 34 sanctions against ACC for prosecution of this frivolous appeal.

#### *I. Facts and procedural history*

In 2007, Christopher and Susan Wall ("the Walls") obtained a \$765,000.00 loan from SunTrust to acquire the Property and build a house on it. The Property was originally owned by GHC Land Development, LLC, which transferred it to NC Land Finders, LLC by deed dated 3 April 2007. NC Land Finders then executed a deed conveying the property to the Walls on 5 April 2007 at a purchase price of \$165,000.00. That same day, the Walls executed a deed of trust in favor of SunTrust. The deed from NC Land Finders to the Walls and the deed of trust from the Walls to SunTrust were both recorded in the Henderson County Registry on 13 April 2007. However, it was subsequently discovered that although it had been

executed, the deed conveying the Property from GHC to NC Land Finders had not been recorded, thus leaving a record gap in the chain of title. To correct this issue, the GHC deed was recorded in the Henderson County Registry on 16 May 2007. Out of an abundance of caution, the deed from NC Land Finders to the Walls and the deed of trust from the Walls to SunTrust were re-recorded on 18 September 2007.

The Walls hired ACC to build a house on the Property. On 12 June 2007, ACC began furnishing labor and materials. ACC completed construction in January 2009, but claimed that it had not been fully paid for the work it performed. On 20 January 2009, ACC filed a claim of lien against the Property in the amount of \$296,513.71. Later in 2009, the Walls also defaulted on their debt to SunTrust by failing to make payments as due.

On 6 July 2009, ACC filed a lawsuit ("ACC I") in Henderson County Superior Court against the Walls and SunTrust to enforce its claim of lien and also seeking damages for breach of contract and recovery in *quantum meruit*. On 6 August 2009, SunTrust instituted a foreclosure special proceeding pursuant to its deed of trust in Henderson County Superior Court.

On 18 August 2009, ACC amended its complaint in ACC I to include a fourth cause of action for "Declaratory Judgment to Quiet

Title and Motion for Injunctive Relief." In its amended complaint, ACC contended that its lien had priority over SunTrust's deed of trust, which ACC argued was void due to a defect in the Property's chain of title because at the time of its original execution in April 2007, the deed conveying the Property from GHC to NC Land Finders had not yet been recorded. Thus, ACC asked the court to enjoin the foreclosure, declare that ACC's lien held priority, declare "the rights, interests, and priorities of ACC and SunTrust as creditor[s] of the Walls," and declare "the rights, interests, and priorities of the parties in and to [the Property]."

That same day, in response to SunTrust's initiation of foreclosure proceedings, ACC's President Gene Carswell—who is also a principal member-manager of GHC—executed a verification of a "Petition to Determine Lien Priorities and to Determine Disposition of Funds Upon Foreclosure Sale, and to Enjoin Foreclosure Sale." This petition, which was subsequently filed on 1 September 2009, requested that the court determine the respective lien priorities between ACC and SunTrust and determine how the foreclosure proceeds should be distributed. Here, however, ACC offered a different theory for its lien priority, contending that although SunTrust had a valid lien, it was only up to the amount of the purchase price because it did not attach to the Property

until the 18 September 2007 re-recording, and therefore "SunTrust's lien has priority over ACC's lien to the extent of \$165,000.00 which was the purchase price of [the Property]. ACC's lien has priority over SunTrust's lien to the extent of disbursements made by SunTrust from construction loan proceeds in excess of \$165,000.00." ACC further argued:

23. . . . SunTrust is entitled to receive the first \$165,000.00 from the foreclosure sale proceeds after costs and taxes. Next, ACC is entitled to receive \$179,998.01 from the foreclosure proceeds. Then, SunTrust is entitled to receive the balance of the foreclosure proceeds.

. . . .

28. ACC needs for this court to determine how the sales proceeds from the foreclosure of [the Property] should be distributed upon completion of the foreclosure sale of [the Property].

29. ACC needs for this court to order the distribution of \$179,998.01 to ACC from the sales proceed[s] of the foreclosure sale of [the Property].

Although ACC set a hearing on its foreclosure petition for 16 September 2009, the record does not indicate what happened at that hearing. In any event, on 30 August 2010, the assistant clerk of Henderson County Superior Court entered an order finding that SunTrust's deed of trust represented a valid debt and permitting

SunTrust to proceed with its foreclosure sale of the Property, with a sale date set for 20 September 2010.

On 17 September 2010, ACC filed a separate action against SunTrust and the Walls seeking a preliminary and permanent injunction of the foreclosure sale and specifically asking for the court to determine "the rights of the parties with respect to the Claim of Lien and any proceeds which may arise from the foreclosure of [the Property]." This time, ACC argued that due to the aforementioned recording irregularities, it should be considered the senior lienholder against the Property under the theory that SunTrust did not acquire a valid lien to the Property until 18 September 2007. A hearing on ACC's request for injunctive relief was held on 27 September 2010—after the scheduled foreclosure sale but before the expiration of the upset-bid period—and, after the court denied that request by written order dated 30 September 2010, ACC voluntarily dismissed that action. The court did, however, grant ACC's Rule 60 motion to reinstate its claims from ACC I, which had previously been voluntarily dismissed with prejudice on motion from ACC's former counsel prior to the termination of her representation in the matter.

The foreclosure sale for the Property was held as planned on 20 September 2010, and SunTrust was the winning bidder with a bid

of \$616,250.00. On 1 October 2010, the foreclosure trustee executed a notarized letter stating that the foreclosure sale proceeds had been distributed and "the original note involved in the above captioned foreclosure has been credited with the sum of \$612,569.83 representing the full amount of the proceeds of the sale less allowable costs and fees." The trustee's final report was audited and approved by the Henderson County clerk of court on 12 October 2010. That same day, ACC filed notice of dismissal without prejudice regarding the fourth cause of action in its amended complaint in *ACC I* for "Declaratory Judgment to Quiet Title and Motion for Injunctive Relief."

On 15 August 2011, SunTrust moved for summary judgment in *ACC I*. At the hearing, SunTrust argued that its deed of trust should have priority over the foreclosure proceeds because it was recorded before ACC ever provided any work on the Property, that any irregularities in the chain of title were immaterial because ACC had sufficient notice thereof, and that the subsequent September 2007 re-recording had no impact on lien priorities. For its part, ACC urged that its lien should have first priority because SunTrust's deed of trust was not recorded within the Property's chain of title until September 2007, after ACC's lien had already

attached. At one point during the hearing, the trial court<sup>1</sup> inquired:

THE COURT: What happens if any of this money was used to purchase the real property? Then what doctrine comes into play?

[ACC's counsel]: I don't think there's any doctrine that comes into play in that situation, Your Honor. I'm not aware of any.

THE COURT: What about the doctrine of instantaneous seisin?

[ACC's counsel]: The doctrine of instantaneous seisin would not be applicable here, Your Honor, because it is not a true purchase money deed of trust. . . .

After further discussion, during which ACC continued to deny the applicability of the doctrine of instantaneous seisin while insisting on a stringent application of our State's recording statutes, the trial court directed the parties' attention to this Court's holding in *West Durham Lumber Co. v. Meadows*, 179 N.C. App. 347, 635 S.E.2d 301 (2006), *disc. review denied*, 361 N.C. 704, 655 S.E.2d 404 (2007), noting:

THE COURT: I'll give you this case and you all can go look at it. . . . It's not as confusing as this case. The scenario is very similar. There was a deed and a deed of trust, a purchase money deed of trust, only part of it being a purchase money deed of trust. The lumber company actually provided materials to

---

<sup>1</sup> The Honorable Gary M. Gavenus, Superior Court Judge, presided over this hearing.

the property prior to the deed and the deed of trust being recorded, and the [C]ourt held that the deed of trust had priority.

Toward the end of the hearing, the court inquired whether ACC was seeking any surplus proceeds from the foreclosure sale:

THE COURT: But let me ask you this. As regards to this foreclosure proceeding, does [ACC] seek any alleged surplus at the foreclosure sale?

[ACC's counsel]: I don't think there was any surplus, Your Honor.

[SunTrust's counsel]: Not to my knowledge, Your Honor. I think it was a credit bid for the amount of the loan.

[ACC's counsel]: The bank bid in at the sale the amount that it was owed, so there's no surplus to be had.

[SunTrust's counsel]: Thus the lawsuit.

THE COURT: I understand that.

On 13 September 2011, the trial court entered an order granting summary judgment to SunTrust. In its conclusions of law, the court concluded that:

1. [SunTrust's] Deed of Trust has priority over [ACC's] Claim of Lien.
2. The Foreclosure Action wiped out [ACC's] Claim of Lien.

ACC initiated an appeal of the summary judgment order to this Court. However, that appeal was dismissed by the trial court for

failure to prosecute. ACC then filed a Stipulation of Dismissal as to all claims against the Walls and attempted to file a new notice of appeal, which was ultimately dismissed by this Court in December 2012 prior to reaching the merits.

The present case arises from a complaint ACC filed on 11 October 2013, and amended on 9 December 2013, against SunTrust in Henderson County Superior Court for unjust enrichment and a constructive trust. This time, the theory behind ACC's lawsuit was that under the doctrine of instantaneous seisin, its rights as a junior lienholder had been violated because

. . . the lien created by [SunTrust's] Deed of Trust is superior to ACC's claim of lien, as a matter of law, but only to the extent that funds were used to purchase real property, and that once SunTrust[] recovered its initial outlay for the Walls' purchase of real property, the remaining funds should have been used to satisfy ACC's junior claim of lien.

Thus, ACC requested that SunTrust "be ordered to convey to ACC funds sufficient to satisfy its claim of lien on [the Property]." SunTrust responded by filing a motion to dismiss and a motion for sanctions, arguing that ACC's claim was frivolous, unwarranted by existing law, and barred by *res judicata*.

During a hearing held on 17 February 2014, SunTrust argued in support of its motions that: (1) ACC had ample opportunity during the course of the prior litigation to raise its claims as a junior

lienholder but failed to do so; (2) ACC had previously stated it was not seeking any surplus funds from the foreclosure sale and in fact denied that any surplus existed, and should therefore be estopped from arguing to the contrary; (3) nothing in the 13 September 2011 summary judgment order indicated that the doctrine of instantaneous seisin applied in this case; (4) even assuming *arguendo* that the doctrine did apply and ACC was a junior lienholder with a valid claim for surplus proceeds from the foreclosure sale, it was now barred from recovery because it failed to timely claim those proceeds from the clerk of court, which *West Durham Lumber* held was a mandatory prerequisite for aggrieved junior lienholders; and (5) given this case's factual similarity to *West Durham Lumber*, ACC should have known its attempt to raise these claims in a subsequent lawsuit would be barred by *res judicata*.

For its part, ACC argued that: (1) the doctrine of instantaneous seisin was the only possible rationale for the 13 September 2011 summary judgment order in favor of SunTrust, which meant ACC was entitled to apply the foreclosure sale surplus proceeds to satisfy its junior lien; (2) ACC suffered a new, distinct injury when the trustee failed to deposit the surplus proceeds with the clerk of court; and (3) ACC was not required to

include its claims as an aggrieved junior lienholder in ACC I, and therefore *res judicata* did not apply, because its original complaint was filed before SunTrust initiated the foreclosure proceedings that gave rise to its aforementioned injury. Toward the end of the hearing, the trial court expressed concern that ACC's new lawsuit amounted to a collateral attack on the 13 September 2011 order granting summary judgment to SunTrust in ACC I:

And frankly, I was—when I read this, I was really surprised concerning the—the previous rulings in the case. In particular, the [13 September 2011 summary judgment order], where the court found the deed of trust has priority over the claim of lien and foreclosure action wiped out the claim of lien. Because to seek what you are asking for would require as a practical matter that that order be disregarded to give you money after all of this has been said and done in Judge Gavenus's order. Whether you go by theory of estoppel, instantaneous seisin, whatever, it required setting aside that and saying, well, your lien has priority because of unjust enrichment or any other reason. That in effect is setting aside the order which I don't think I have authority to do. So that's what troubled me about the case.

On 3 March 2014, the trial court granted both SunTrust's motion to dismiss and its motion for sanctions in separate written orders. In its order granting SunTrust's motion for sanctions pursuant to North Carolina Rule of Civil Procedure 11 and section 6-21.5 of

our General Statutes, the court found as facts and concluded as a matter of law that the 13 September 2011 summary judgment order in ACC I was binding and final between the parties and that, in light of that order, ACC's subsequent lawsuit was frivolous, facially implausible, presented no justiciable issues, and was brought "for an improper purpose, including the harassment of SunTrust and the needless increase in the cost of litigation." Consequently, the trial court concluded that SunTrust was entitled to an award of sanctions against ACC for \$19,045.50 in attorneys' fees. ACC gave written notice of appeal on 12 March 2014. On 12 September 2014, pursuant to Rule 34(a) of our Rules of Appellate Procedure, SunTrust filed a motion with this Court designated "Defendant-Appellee SunTrust Mortgage, Inc.'s Motion for Sanctions" and, by order dated 29 September 2014, that motion was referred to this panel.

## *II. Analysis*

### *A. Motion to dismiss and res judicata*

ACC first argues that the trial court erred in dismissing its amended complaint based on *res judicata*. Specifically, ACC contends that its amended complaint states valid equitable claims available to it as a junior lienholder for surplus proceeds from

a foreclosure sale under the doctrine of instantaneous seisin. We disagree.

On a Rule 12(b)(6) motion to dismiss, the question is

whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted. Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. We consider [the] plaintiff's complaint to determine whether, when liberally construed, it states enough to give the substantive elements of a legally recognized claim.

*Allred v. Capital Area Soccer League, Inc.*, 194 N.C. App. 280, 282-83, 669 S.E.2d 777, 778-79 (2008) (citations and internal quotation marks omitted). This Court's review of the trial court's granting of a motion to dismiss pursuant to Rule 12(b)(6) is *de novo*. *Id.* at 283, 669 S.E.2d at 779.

In the present case, the trial court's order granting SunTrust's motion for sanctions makes clear that it granted SunTrust's Rule 12(b)(6) motion to dismiss based on *res judicata*. The doctrine of *res judicata* "precludes a second suit involving the same claim between the same parties or those in privity with them when there has been a final judgment on the merits in a prior

action in a court of competent jurisdiction." *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 84, 609 S.E.2d 259, 261 (2005). "The purpose of the doctrine of *res judicata* is to protect litigants from the burden of relitigating previously decided matters and to promote judicial economy by preventing unnecessary litigation." *Holly Farm Foods, Inc. v. Kuykendall*, 114 N.C. App. 412, 417, 442 S.E.2d 94, 97 (1994). In that sense, the doctrine of *res judicata* works in conjunction with other legal and equitable doctrines that preserve the integrity and finality of judgments by prohibiting collateral attacks and estopping litigants from intentionally adopting self-contradictory positions to gain unfair advantage. See, e.g., *State v. Cortez*, \_\_ N.C. App. \_\_, \_\_, 747 S.E.2d 346, 358 (2013) ("A collateral attack upon a judicial proceeding is an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it. North Carolina does not allow collateral attacks on judgments.") (citations, internal quotation marks, and brackets omitted); *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005) ("Judicial estoppel, or preclusion against inconsistent positions, is an equitable doctrine designed to protect the integrity of the courts and the judicial process. . . . It is to prevent litigants from

playing fast and loose with the courts and deliberately changing positions according to the exigencies of the moment. Thus, judicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation. The doctrine prevents the use of intentional self-contradiction . . . as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.") (citations, internal quotation marks, and brackets omitted). In order to successfully assert the doctrine of *res judicata*, a litigant must prove three essential elements: "(1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits." *Moody*, 169 N.C. App. at 84, 609 S.E.2d at 262.

Here, because SunTrust was previously granted summary judgment against ACC in *ACC I* and that judgment became final when ACC's appeal was dismissed by this Court, the only essential element of *res judicata* in question is whether there is an identity of causes of action. Under *res judicata*, "all matters, either fact or law, that were or should have been adjudicated in the prior action are deemed concluded." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). "[S]ubsequent

actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of *res judicata*," *Bockweg v. Anderson*, 333 N.C. 486, 494, 428 S.E.2d 157, 163 (1993), because "the judgment in the former action or proceeding is conclusive in the latter not only as to all matters actually litigated and determined, but also as to all matters which could properly have been litigated and determined in the former action or proceeding." *Fickley v. Greystone Enters., Inc.*, 140 N.C. App. 258, 260, 536 S.E.2d 331, 333 (2000) (citation omitted). "A party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery[.]" *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 23, 331 S.E.2d 726, 730 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986).

ACC contends that there is no identity of causes between ACC I and the present case for two related reasons. First, ACC argues that because the 13 September 2011 summary judgment order did not address its rights as a junior lienholder, there was never any final judgment on the merits to bar its claims for unjust enrichment and a constructive trust. Second, ACC argues that these claims arose from a new and distinct injury—namely, the trustee's distribution of the entirety of the foreclosure sale's proceeds to

SunTrust instead of depositing the surplus with the clerk of court—that did not occur until well after ACC filed its original lawsuit. After careful consideration, we are not persuaded by either of ACC's arguments.

We note first that ACC's current lawsuit revolves around a flawed premise—specifically, that the 13 September 2011 summary judgment order was based on the doctrine of instantaneous seisin. ACC argues that the doctrine of instantaneous seisin is the only possible rationale for the court's conclusion that SunTrust's deed of trust has priority over its claim of lien, which was extinguished by the foreclosure of the Property. In support of this argument, ACC cites the trial court's discussion of the doctrine and its reference to this Court's decision in *West Durham Lumber* during the 15 August 2011 hearing.

As the trial court noted during that hearing, the facts in the present case are very similar to those in *West Durham Lumber*. In that case, Central Carolina Bank ("CCB") loaned a homebuilder \$560,000.00 to finance the construction of a home, with \$112,000.00 of that amount used to purchase the real property. 179 N.C. App. at 349-50, 635 S.E.2d at 302-03. The plaintiff, West Durham Lumber, first furnished materials for the construction of the home before the deed of trust securing the loan was ever recorded. *Id.* at 349,

635 S.E.2d at 302. When the homebuilder eventually defaulted on its payments, CCB initiated foreclosure proceedings and was the winning bidder at the foreclosure sale with a bid of \$425,000.00. *Id.* at 350, 635 S.E.2d at 303. After the foreclosure sale, West Durham Lumber sued to enforce its lien claim and have its lien declared senior to CCB's lien, and the trial court ruled in its favor. *Id.* The bank appealed and on review, this Court held even though CCB's deed of trust was recorded after West Durham Lumber's lien attached with its first furnishing of materials, CCB still had first priority in the amount of \$112,000.00 for the purchase price of the property based on the doctrine of instantaneous seisin. *Id.* at 354, 635 S.E.2d at 305. Moreover, we held that CCB's foreclosure had wiped out West Durham Lumber's junior lien, and that in order to recover anything West Durham Lumber was required to comply with the procedure mandated by N.C. Gen. Stat. § 44A-13 to enforce its lien and also file a petition for recovery of surplus proceeds with the clerk of court as required by N.C. Gen. Stat. § 45-21.31. *Id.* at 355, 635 S.E.2d at 306. Because West Durham Lumber did not file any claim for surplus proceeds with the clerk, we held that it failed to perfect its claim and was blocked from recovery. *Id.*

West Durham Lumber then filed a second lawsuit against CCB (which by that time had merged with SunTrust) asserting claims for unjust enrichment and constructive trust under the theory that the bank should never have received all the foreclosure sale proceeds. *See West Durham Lumber Co. v. SunTrust Bank*, \_\_ N.C. App. \_\_, 673 S.E.2d 883 (2009) (unpublished), available at 2009 WL 678748 ("*West Durham Lumber II*"). When SunTrust moved for dismissal based on *res judicata*, West Durham Lumber argued that its claims should not be barred because they arose after the first lawsuit was filed and were separate and distinct from its claim for lien priority and enforcement against the real property. *Id.* at \*1. The trial court rejected West Durham Lumber's argument and granted SunTrust's motion for dismissal. *Id.* On appeal, this Court affirmed that decision. Because West Durham Lumber should have included a claim for surplus proceeds in the prior litigation but failed to do so, its subsequent lawsuit was barred because "simply asserting a new legal theory or seeking a different remedy does not circumvent the application of *res judicata*." *Id.* at \*2.

ACC's argument in the present case presumes that the doctrine of instantaneous seisin applies here just as it did in *West Durham Lumber*. However, ACC's argument is not supported by the 13 September 2011 summary judgment order, which does not mention the

doctrine of instantaneous seisin or provide any indication that the trial court believed it was applicable to the underlying facts in this matter. Instead, the order simply concludes that

1. [SunTrust's] Deed of Trust has priority over [ACC's] Claim of Lien.
2. The Foreclosure Action wiped out [ACC's] Claim of Lien.

While ACC insists that the doctrine of instantaneous seisin is the only possible rationale for finding that SunTrust's deed of trust held priority over its claim of lien, the transcript from the 15 August 2011 hearing demonstrates otherwise. For example, SunTrust argued that its deed of trust should have priority over ACC's lien because it was recorded before ACC ever furnished labor or materials to the Property, and that ACC's lien was therefore extinguished by the foreclosure. SunTrust also cited our Supreme Court's decision in *City of Durham v. Pollard*, 219 N.C. 750, 14 S.E.2d 818 (1941), which suggests that ACC is not the kind of party that our State's recording statute aims to protect. For its part, ACC denied that the doctrine of instantaneous seisin applied and insisted that its claim of lien held first priority. ACC also explicitly stated that it was not seeking any surplus proceeds from the foreclosure sale. Moreover, at the close of the hearing, the trial court requested that the parties submit briefs regarding

whether this Court's holding in *West Durham Lumber* should control the outcome. However, the subsequent summary judgment order is devoid of any reference to either *West Durham Lumber* or the doctrine of instantaneous seisin.

In the present case, ACC argued during the 17 February 2014 hearing that SunTrust had actually accepted that the doctrine applied in this case because it submitted a brief after the 15 August 2011 hearing that included an argument in the alternative to that effect, with the implication being that SunTrust should be estopped from changing positions now to argue that it does not. But by ACC's own logic, it too should be estopped from arguing for the doctrine's application, given its express denial during the 15 August 2011 hearing that it was seeking any surplus proceeds and this Court's long-standing prohibition against self-serving changes of position. *See Price*, 169 N.C. App. at 191, 609 S.E.2d at 452. In any event, ACC could have addressed this issue in its appeal as of right to this Court in *ACC I*, but that appeal was dismissed after ACC failed to prosecute it. Therefore, ACC's argument in the present case that the *ACC I* summary judgment order was based on the doctrine of instantaneous seisin basically amounts to an attempt to collaterally attack the trial court's judgment, which is strictly barred under North Carolina law, *see Cortez*, \_\_

N.C. App. at \_\_\_, 747 S.E.2d at 358, and we emphatically decline to allow ACC to rewrite the order in a way that distorts the procedural history of this litigation.

Even assuming *arguendo* that the doctrine of instantaneous seisin did apply in the present case, ACC's claims would still be barred by *res judicata*. ACC first contends that *res judicata* is inapplicable because there was never any final judgment on the merits in *ACC I* regarding ACC's rights to claim surplus proceeds as a junior lienholder. This may be true, but it does not mean ACC had no opportunity to include these claims in its prior litigation. In fact, ACC even acknowledges that at various points in the proceedings it actually did assert claims that could have resolved these issues. On the one hand, in its amended complaint in *ACC I*, ACC sought a declaratory judgment to quiet title and determine the parties' lien priorities. ACC likewise asked for a determination of lien priorities when it filed for an injunction to block SunTrust from foreclosing on the Property. On the other hand, in the petition it filed in response to SunTrust's initiation of foreclosure proceedings, ACC not only requested a determination of lien priorities but also asserted the rights of a junior lienholder under the doctrine of instantaneous seisin, contending "SunTrust's lien has priority over ACC's lien to the extent of \$165,000.00

which was the purchase price of [the Property]. ACC's lien has priority over SunTrust's lien to the extent of disbursements made by SunTrust from construction loan proceeds in excess of \$165,000.00." However, ACC eventually took voluntary dismissals on each of these claims, which ACC now relies on as the lynchpin of its argument that the 13 September 2011 summary judgment order did not constitute a final judgment on the merits regarding its rights to claim surplus proceeds as a junior lienholder. Nevertheless, it is well established that, "[a] party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery," *Rodgers Builders, Inc.*, 76 N.C. App. at 23, 331 S.E.2d at 730, and that therefore under the doctrine of *res judicata*, "all matters, either fact or law, that were or should have been adjudicated in the prior action are deemed concluded." *Thomas M. McInnis & Assoc., Inc.*, 318 N.C. at 428, 349 S.E.2d at 556. Thus, despite the lack of a final judgment on the merits regarding ACC's rights as a junior lienholder, the procedural history of ACC I clearly demonstrates that ACC could and should have brought these claims in its prior lawsuit. Therefore, just as we held in *West Durham Lumber II*, ACC's current lawsuit is barred because "simply asserting a new legal theory or

seeking a different remedy does not circumvent the application of *res judicata*." \_\_ N.C. App. at \_\_, 673 S.E.2d 883 at \*2.

ACC also argues that *res judicata* does not bar its current claims for unjust enrichment and constructive trust because these arose from a new and distinct injury—namely, the trustee's distribution of the entirety of the foreclosure sale's proceeds to SunTrust instead of depositing the surplus with the clerk of court. This Court previously rejected a similar argument by the unsuccessful plaintiffs in *West Durham Lumber II*. ACC admits that both the underlying facts and the theory behind its appeal are nearly identical to those in *West Durham Lumber II*, but it attempts to distinguish its case by focusing on the timing of its original lawsuit. Specifically, ACC emphasizes that, unlike the unsuccessful plaintiffs in the *West Durham Lumber* litigation who sued after the foreclosure sale was completed, ACC's original lawsuit was filed *before* SunTrust initiated foreclosure proceedings, which were not completed until over a year later. Thus, unlike in *West Durham Lumber*, ACC had no opportunity to claim the surplus proceeds from the clerk of court prior to filing *ACC I*, and was further injured after the foreclosure sale because the trustee gave everything to SunTrust, thereby giving rise to ACC's current equitable claims, for which ACC insists it had no recourse

as an aggrieved junior lienholder for pursuing other than this lawsuit, given the statutory limitations on the clerk of court's authority discussed by our Supreme Court in *In re Vogler Realty, Inc.*, 365 N.C. 389, 722 S.E.2d 459 (2012). Finally, ACC contends that its claims should not be barred by *res judicata* because, despite the similarities between this case and *West Durham Lumber II*, the latter should have no binding effect here since it was an unpublished opinion, and because *ACC I* was predicated on a good-faith belief that its lien held first priority and ACC should not have been required to amend its complaint or alter its argument when there is no North Carolina authority that explicitly requires a party to amend the party's complaint after litigation has been ongoing for a period in excess of a year when a new cause of action arises from a separate injury.

ACC may be correct that North Carolina law does not explicitly require a party to amend the party's complaint in order to avoid the effect of *res judicata* on a subsequently arising claim. Nevertheless, that does not necessarily mean that *res judicata* is inapplicable here. We are not persuaded by ACC's attempt to distinguish this case from *West Durham Lumber II*. ACC's argument fails because it ignores the fact that although ACC may not have been able to claim surplus proceeds from the clerk of court when

it filed its original lawsuit on 6 July 2009, SunTrust initiated its foreclosure proceedings one month later on 6 August 2009, which provided ACC with ample notice of the need to protect its rights as a junior lienholder and more than a year to do so, given the timing of the foreclosure sale. Indeed, the procedural history of *ACC I*—specifically, the amended complaint ACC filed less than two weeks after SunTrust initiated foreclosure proceedings against the Property, as well as the petition it filed the very same day in response to those foreclosure proceedings—demonstrates that ACC clearly contemplated the need to protect its rights as a junior lienholder. What makes this case so similar to *West Durham Lumber II*, regardless of any minor differences in the timing of ACC's original lawsuit, is the fact that ACC failed to take the necessary steps to protect its rights as a junior lienholder. In that sense, given this Court's long-standing recognition that a party must bring forth the party's whole case at one time, ACC's current equitable claims and the issue of when they arose are entirely beside the point. ACC could and should have sought to protect its rights as a junior lienholder in *ACC I*. If anything, ACC's failure to exercise basic due diligence is even more egregious in the present case, given that *West Durham Lumber I* made clear that junior lienholders must carefully follow the proper procedures in

order to recover surplus proceeds, while *West Durham Lumber II* made clear that this Court will not bail out those who fail to do so by suspending the operation of *res judicata* to grant them a second bite at the apple. ACC is correct that as an unpublished opinion, *West Durham Lumber II* does not control the outcome of the present case. But given the extensive attention both parties focused on the *West Durham Lumber* litigation in their arguments to the trial court, ACC certainly had notice that its claims could be similarly barred, especially since there was nothing particularly novel about this Court's *res judicata* analysis in *West Durham Lumber II*. While that case is not binding on our decision here, we reach the same conclusion. ACC cannot circumvent the application of *res judicata* by seeking a different remedy and asserting a new theory for a claim that could and should have been resolved in ACC I. Accordingly, we hold that the trial court did not err in granting SunTrust's Rule 12(b)(6) motion to dismiss.

#### *B. Sanctions*

ACC also contends that the trial court erred in awarding \$19,045.50 in attorneys' fees as sanctions to SunTrust pursuant to N.C. Gen. Stat. § 6-21.5 and North Carolina Rule of Civil Procedure 11. In support of this claim, ACC offers several arguments, all of which are meritless.

*1. Sanctions pursuant to N.C. Gen. Stat. § 6-21.5*

First, ACC argues that the award of sanctions is unwarranted under N.C. Gen. Stat. § 6-21.5 because its claims were meritorious. We disagree.

Section 6-21.5 allows the trial court to award "reasonable attorney[s'] fees to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." N.C. Gen. Stat. § 6-21.5 (2013). This statute requires the trial court to review "all relevant pleadings and documents to determine whether attorneys' fees should be awarded," evaluate "whether the losing party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue," and make findings of fact and conclusions of law to support its award. *Lincoln v. Bueche*, 166 N.C. App. 150, 153-54, 601 S.E.2d 237, 241 (2004) (citations and internal quotation marks omitted). As this Court has previously explained,

[s]urviving a Rule 12(b)(6) motion is not determinative on the issue of justiciability. A justiciable issue is one that is real and present as opposed to imagined or fanciful. Complete absence of a justiciable issue suggests that it must conclusively appear that such issues are absent even giving the losing party's pleadings the indulgent treatment

which they receive on motions for summary judgment or to dismiss.

*Id.* at 154, 601 S.E.2d at 242 (citations and internal quotation marks omitted). In the present case, ACC contends that because its claims were meritorious, the trial court erred in its conclusion of law that, "[e]ven giving ACC's pleadings the indulgent treatment they receive in ruling on a motion to dismiss, the Court finds that there was a complete absence of a justiciable issue of law raised by ACC in the Complaint and Amended Complaint filed in this case." However, as already discussed in detail, the record simply does not support ACC's argument that its claims were meritorious. Indeed, the trial court's sanctions order provides a thorough summation of the procedural history of both ACC I and the present case, with particular emphasis on the facts that ACC knew that the summary judgment order was binding and final law between the parties, and that in light of that summary judgment order ACC's claims were facially implausible. Specifically, the trial court found as facts that:

45. ACC knew at the time the Complaint and Amended Complaint were filed in this action that neither contained a justiciable issue.

46. Even if ACC did not know the Complaint lacked a justiciable issue when it was filed, ACC was clearly aware of that fact upon receiving emails from counsel for SunTrust explaining why the Complaint was frivolous.

47. ACC persisted in litigating the case well after the point at which ACC was aware (or should reasonably have been aware) that the Complaint and Amended Complaint lacked any claim related to a justiciable issue.

Accordingly, we hold that the trial court did not err in imposing sanctions pursuant to section 6-21.5 based on its determination that ACC's claims raised no justiciable issues.

*2. Sanctions pursuant to Rule 11*

Next, ACC argues that the trial court erred in awarding sanctions under Rule 11 based on its conclusion that ACC brought this action for an improper purpose. We disagree.

Rule 11 requires that "[e]very pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record[.]" N.C. Gen. Stat. § 1A-1, Rule 11(a) (2013). Our Supreme Court has made clear that,

[a]ccording to Rule 11, the signer certifies that three distinct things are true: the pleading is (1) well grounded in fact; (2) warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law (legal sufficiency); and (3) not interposed for any improper purpose. A breach of the certification as to any one of these prongs is a violation of the Rule.

*Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992).

When violations of the Rule occur, the trial court "upon motion or

upon its own initiative, shall impose . . . an appropriate sanction." N.C. Gen. Stat. § 1A-1, Rule 11(a). The trial court's decision to impose sanctions under Rule 11 is subject to *de novo* review by this Court, which must determine

(1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under . . . Rule 11(a).

*Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). Regarding sanctions imposed for violations of Rule 11's improper purpose prong, this Court has previously explained that, "an objective standard is used to determine whether a [complaint] has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose. In this regard, the relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior." *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (citation and internal quotation marks omitted). Moreover, an improper purpose may be inferred from "filing successive lawsuits despite the *res judicata* bar of earlier judgments." *Id.*

In the present case, ACC argues that the trial court erred in imposing Rule 11 sanctions because SunTrust did not specifically plead that ACC violated the improper purpose prong and because there are no findings of fact that support the trial court's legal conclusion that, "[i]n light of the prior Summary Judgment Order, the Court finds that ACC filed the Complaint and the Amended Complaint for an improper purpose, including the harassment of SunTrust and the needless increase in the cost of litigation." This argument fails for several reasons. First, the fact that SunTrust did not specifically ask for Rule 11 sanctions based on the improper purpose prong is immaterial, given the Rule's explicit provision that sanctions can be imposed "upon motion or upon [the court's] own initiative." N.C. Gen. Stat. § 1A-1, Rule 11(a). Furthermore, we conclude that the trial court's imposition of sanctions was sufficiently supported by its extensive findings of fact, most significantly its finding that, "[b]ased upon the prior Summary Judgment Order and dismissal of its appeal, ACC knew that this Court's holding that 'The Deed of Trust has priority over the Claim of Lien' was binding and final law between SunTrust and ACC." Indeed, the trial court's rationale for granting SunTrust's motion to dismiss was that ACC's claims were barred by *res judicata*, which is a proper basis for inferring that the present action was brought

for an improper purpose. *See Mack*, 107 N.C. App. at 93, 418 S.E.2d at 689. Thus, given the extensive history of the litigation before us, which encompasses multiple lawsuits by ACC stretching back to 2009, and the fact that ACC's current lawsuit basically amounts to a collateral attack on the summary judgment order that resolved *ACC I*, we conclude that the trial court did not err in imposing sanctions based on its conclusion that ACC brought this action for an improper purpose.

### *3. Amount of award*

Finally, ACC complains that the amount of the trial court's award of attorneys' fees is excessively punitive. ACC cites no specific legal authority in support of this argument, but instead points to the disparity between the \$8,100.00 SunTrust's counsel stated were his costs during the 17 February 2014 hearing and the \$19,045.50 the trial court ultimately awarded as attorneys' fees in its sanctions order. This argument lacks merit.

As a general matter, a trial court's award of attorneys' fees must be supported by proper findings considering "the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Belcher v. Averette*, 152 N.C. App. 452, 457, 568 S.E.2d 630, 633 (2002). Under both section 6-21.5 and Rule 11, we review a trial court's award

of attorneys' fees for abuse of discretion. *See, e.g., Turner*, 325 N.C. at 165, 181 S.E.2d at 714; *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 206 N.C. App. 192, 197, 696 S.E.2d 559, 563 (2010).

In the present case, although ACC is correct that the amount of attorneys' fees awarded in the sanctions order is more than double the amount that SunTrust's counsel stated he was seeking during the 17 February 2014 hearing, the trial court's award of \$19,045.50 is well supported by extensive factual findings based on affidavits regarding the amount of work performed, the degree of skill required, and the reasonableness of the rates charged here in relation to those customarily charged for similar work by attorneys of similar experience and skill. We therefore conclude that the trial court did not err or abuse its discretion in calculating the amount of sanctions it awarded as attorneys' fees in conjunction with ACC's frivolous lawsuit.

#### *4. SunTrust's Rule 34 Motion*

Pursuant to Rule of Appellate Procedure 34, SunTrust moves for the imposition of sanctions against ACC and its counsel for the prosecution of this frivolous appeal. Rule 34(a) permits this Court to impose sanctions on an appellant where "the appeal was not well grounded in fact and was not warranted by existing law or

a good faith argument for the extension, modification, or reversal of existing law[,]” or “the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[.]” N.C.R. App. P. 34(a)(1,2).

In light of the preceding analysis, we conclude that this appeal was frivolous and taken for an improper purpose. Therefore, we agree that sanctions are warranted and order that ACC and its appellate counsel pay the costs and reasonable expenses, including reasonable attorneys’ fees, incurred by SunTrust on account of this appeal. N.C.R. App. P. 34(b)(2).

#### *Conclusion*

For determination of SunTrust’s costs and expenses in defending this frivolous appeal, the matter is REMANDED to the trial court. The orders of the trial court granting SunTrust’s Rule 12(b)(6) motion to dismiss and motions for sanctions pursuant to Rule 11 and section 6-21.5 are

AFFIRMED.

Chief Judge MCGEE and Judge STEELMAN concur.